DRN-6063018

The complaint

Mr K's complaint is, in essence, that Shawbrook Bank Limited (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with him under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying claims under Section 75 of the CCA.

Although the timeshare in question was bought in the joint names of Mr K and Ms L, the credit agreement was in Mr K's sole name, so he is the only eligible complainant here. I will, however, refer to both Mr K and Ms L where it is appropriate to do so.

What happened

Mr K and Ms L were members of a timeshare from a timeshare provider (the 'Supplier') having first bought a trial membership in October 2017.

Their first full membership was bought in October 2018 when they purchased 1,320 fractional points in the Suppliers 'Fractional Club', funded by a loan from the Lender. This purchase (and the associated loan) is not the subject of this complaint and is included here for background purposes only.

Fractional Club membership was, in addition to providing holiday rights, asset backed. This meant it included a share in the net sales proceeds of a property named on the purchase agreement (hereon referred to as the 'Allocated Property').

On 13 June 2019 (the 'Time of Sale' being considered here) Mr K and Ms L traded in their 1,320 fractional points[1] towards the purchase of an upgraded membership (the 'Signature Collection') and 1,540 fractional points. This had a purchase price of £30,007, but after trading in their fractional points, they ended up paying £12,847 for their Signature Collection membership (the 'Purchase Agreement').

Signature Collection was also asset backed, which meant that, in addition to holiday rights, Mr K and Ms L were entitled to receive their fractional share in the net sales proceeds of the Allocated Property named on their Purchase Agreement after their membership term ends.

But Signature Collection membership differed in that unlike their Fractional Club membership, it guaranteed Mr K and Ms L the right to stay in the Allocated Property (which was sold as being more luxurious and better appointed than the standard properties) for a set week every year (week 10 in their case) if they wished. Or like their previous fractional membership, they could use their 1,540 points to book accommodation from the Supplier's portfolio of resorts.

Mr K paid for their Signature Collection membership by taking finance from the Lender (the 'Credit Agreement) of £34,898 in his sole name. This consolidated the outstanding balance of the previous loan from the Lender.

[1] By trading in this membership its purchase agreement was cancelled and Mr K and Ms L gave up their rights to the share in the associated allocated property when it is sold.

Mr K – using a professional representative (the 'PR') – wrote to the Lender on 8 December 2021 (the 'Letter of Complaint') to raise a number of different concerns about their purchase of the Signature Collection and the associated credit relationship with the Lender. As those concerns haven't changed since they were first raised, and as both sides are familiar with them, it isn't necessary to repeat them in detail here beyond the summary above.

The Lender dealt with Mr K's concerns as a claim, which it did not accept. Unhappy with this outcome the PR referred the complaint to the Financial Ombudsman Service.

Upon being contacted by this Service, the Lender said it hadn't dealt with Mr K's concerns as a complaint, and it would now do so. It subsequently sent its final response to his complaint on 16 June 2022, rejecting it on all grounds.

As he did not accept this outcome, Mr K asked for his complaint to be considered by this Service. It was assessed by an Investigator who, having considered the information on file, upheld the complaint on its merits.

The Investigator thought that the Supplier had marketed and sold the Signature Collection membership as an investment to Mr K and Ms L at the Time of Sale in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations'). And given the impact of that breach on their purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr K was rendered unfair to him for the purposes of Section 140A of the CCA.

The Lender disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

The provisional decision

Having considered everything, I thought the complaint ought to be upheld. I set out my initial thoughts in a provisional decision (the 'PD') and invited both sides to submit any new evidence or arguments that they wished me to consider before I made my final decision.

In my PD I said:

"I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

And having done that, I currently think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling the Signature Collection membership to Mr K and Ms L as an investment, which, in the circumstances of this complaint, rendered the credit relationship between Mr K and the Lender unfair to him for the purposes of Section 140A of the CCA.

However, before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I recognise that there are a number of aspects to this complaint, it is not necessary to make formal findings on all of them because, even if one or more of those aspects ought to succeed, the redress I am currently proposing puts Mr K in the same or a better position than he would otherwise be in.

The witness testimony

As part of the PR's submissions, a statement from Mr K was sent to this Service on 8 January 2014. It is not signed, and is dated 9 October 2020. The statement reads as follows:

> *"We first made a purchase with [the Supplier] on the 29th of October 2018, after my wife had entered a competition with [the Supplier] and was subsequently invited to attend a meeting in Gloucester to discuss opportunities with [the Supplier]. This meeting ended up lasting half a day (which was longer than we had had anticipated), in which we were told about the benefits of purchasing Fractional Ownership which could be sold after a certain number of years, and we would receive our money back. We were assured that this was not a timeshare, it was an investment in property, and hence, we were eventually convinced into purchasing Marina Dorado unit 7-2-A (3 bedroom) for 1,320 fractional points. This was purchased for £34,898 and was paid with a loan from Shawbrook Bank. This loan was brokered by [the Supplier] at this meeting and provided with pre prepared paperwork. We should add that we felt we were not given adequate time to read and digest this paperwork.*
>
> *However, whilst on holiday making use of this timeshare on the 13th of June 2019, we were approached by a representative and asked to attend the sales meeting. This meeting lasted most of the day, in which we were told that through upgrading to a Signature Collection property (which was a far more desirable property), it would prove much easier to resell, it would be a better investment and make us more money, a bigger profit. Hence, after a pressurised sales meeting, we were eventually convinced into purchasing a 2-bedroom suite 29A (week 10) at the Sunningdale Village. This was purchased for £12,847 and was paid with a loan from Shawbrook Bank. This loan was brokered by [the Supplier] and provided with pre prepared paperwork. We should add that due to the sales pressure of this meeting we felt we were not given adequate time to read and digest this paperwork.*
>
> *However, since purchasing this timeshare, we have been informed that the promises of resale made by [the Supplier] are highly unlikely to come to fruition, as all fractional owners must agree to the resale of this property, which is highly unlikely. We should add that we feel that this purchase was grossly mis sold as not being a timeshare originally, which we now know to be false."*

I have thought about how much weight I can place on the contents of the statement when considering the merits of Mr K's complaint.

As I've said, the statement is dated 9 October 2020, but it was not sent to this Service until January 2024. But I can see on the statement that a telephone call booking was made with Mr K and Ms L by the PR on 9 October 2020, so it appears likely that a telephone call was set up to take details for the statement on that date. And the Supplier has said that it received correspondence from the PR on behalf of Mr K and Ms L in November 2020, so the statement was probably prepared as part of the PR's timeshare relinquishment work. Indeed, the Letter of Complaint, which was sent to the Lender just over a year later is generally consistent with the contents of the statement, which leads me to think the statement was used to inform the Letter of Complaint. So, on balance, I am satisfied that the statement was prepared on 9 October 2020.

But the statement does appear to have been prepared and written by the PR, and as I've said, was probably taken during a telephone conversation. So, I am mindful of the risk that Mr K may have been guided through the process, and the associated risk that what has been written may not be his own specific recollections.

But I think that risk is low, as I can see it contains personal information about their purchasing history that only Mr K and Ms L would have known, so I have no doubt that Mr K and Ms L had a significant input into its contents. It is also not unusual for statements to be prepared on complainants' behalf by professional representatives. Taking everything into account I am satisfied that it is a record of Mr K's recollections of their relationship with the Supplier.

When considering how much weight I can place on Mr K's statement, I am assisted by the judgement in the case of Smith v Secretary of State for Transport [2020] EWHC 1954 (QB).

At paragraph 40 of the judgment, Mrs Justice Thornton helpfully summarised the case law on how a court should approach the assessment of oral evidence. Although in this case I have not heard direct oral evidence, I think this does set out a useful way to look at the written evidence Mr K has provided. Paragraph 40 reads as follows:

> *"At the start of the hearing, I raised with Counsel the issue of how the Court should assess his oral evidence in light of his communication difficulties. Overnight, Counsel agreed a helpful note setting out relevant case law, in particular the commercial case of Gestmin SPGS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm) (Leggatt J as he then was at paragraphs 16-22) placed in context by the Court of Appeal in Kogan v Martin [2019] EWCA Civ 1645 (per Floyd LJ at paragraphs 88-89). In the context of language difficulties, Counsel pointed me to the observations of Stuart- Smith J in Arroyo v Equion Energia Ltd (formerly BP Exploration Co (Colombia) Ltd) [2016] EWHC 1699 (TCC) (paragraphs 250-251). Counsel were agreed that I should approach Ms Smith's evidence with the following in mind:*
>
> a. *In assessing oral evidence based on recollection of events which occurred many years ago, the Court must be alive to the unreliability of human memory. Research has shown that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts (Gestin and Kogan).*
> b. *A proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence (Kogan).*
> c. *The task of the Court is always to go on looking for a kernel of truth even if a witness is in some respects unreliable (Arroyo).*
> d. *Exaggeration or even fabrication of parts of a witness' testimony does not exclude the possibility that there is a hard core of acceptable evidence within the body of the testimony (Arroyo).*
> e. *The mere fact that there are inconsistencies or unreliability in parts of a witness' evidence is normal in the Court's experience, which must be taken into account when assessing the evidence as a whole and whether some parts can be accepted as reliable (Arroyo).*

f. *Wading through a mass of evidence, much of it usually uncorroborated and often coming from witnesses who, for whatever reasons, may be neither reliable nor even truthful, the difficulty of discerning where the truth actually lies, what findings he can properly make, is often one of almost excruciating difficulty yet it is a task which judges are paid to perform to the best of his ability (Arroyo, citing Re A (a child) [2011] EWCA Civ 12 at para 20)."*

So, as I've said, I have thought about how much weight I can place on this statement when considering the merits of Mr K's complaint. And having done so, I feel able to place weight on its contents. I do so whilst being cognisant of the fact that memories can fade over time, and that inconsistencies in evidence are a normal part of someone trying to remember what happened in the past. So, I'm not surprised that there may be some inconsistencies between what he says has happened over the course of their purchases, and what other evidence shows. The question to consider, therefore, is whether there is a core of acceptable evidence from Mr K, such that the inconsistencies have little to no bearing on whether his testimony can be relied on, or whether such inconsistencies are fundamental enough to undermine, if not contradict, what the Supplier was likely to have said and/or done during the sale of the Signature Collection.

I don't, for example, find it in any way material that Mr K has been unclear in setting out how and where they first bought their Fractional Club. The Lender has highlighted that he says it was bought in Gloucester, and the purchase history shows it was actually bought in Spain. Although I agree it is unclear, I think the statement could also be read that it was the trial membership that was bought in Gloucester, not the Fractional Club, so I don't think it is fair to say it is inaccurate in this regard. I also note that Mr K has made an error in recording the price of the Fractional Club. The amount he has stated was actually the amount of finance he took when they bought the Signature Collection. But this appears to be nothing more than an error, or confusion on his behalf about their first purchase. This is a detail that is not, in my view, material to whether or not their subsequent Signature Collection membership was sold as an investment. I also do not think it is material to whether the testimony can be relied on. I don't think these mistakes or inconsistencies fundamentally undermine the crux of the statement, which sets out that both of the fractional memberships, including the Signature Collection membership, were bought because of their investment potential.

So, overall, I am satisfied that I can place weight on Mr K's testimony when considering what most likely happened at the Time of Sale and the merits of Mr K's complaint.

Section 140A of the CCA: did the Lender participate in an unfair credit relationship?

Having considered the entirety of the credit relationship between Mr K and the Lender along with all of the circumstances of the complaint, I think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

1. *The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to both the sale in question, and the previous Fractional Club membership;*
2. *The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;*
3. *Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale; and*
4. *The inherent probabilities of the sale given its circumstances.*

I have then considered the impact of these on the fairness of the credit relationship between Mr K and the Lender.

The Supplier's alleged breach of Regulation 14(3) of the Timeshare Regulations

The Lender does not dispute, and I am satisfied, that Mr K and Ms L's Signature Collection membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling Signature Collection membership as an investment. This is what the provision said at the Time of Sale:

"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."

But Mr K says that the Supplier did exactly that at the Time of Sale – saying, in summary, that they were told by the Supplier that Signature Collection membership was the type of investment that would make them money, and more profit than their existing membership.

The term "investment" is not defined in the Timeshare Regulations. But for the purposes of this provisional decision, and by reference to the decided authorities, an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit.

Mr K and Ms L's share in the Allocated Property clearly constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But it is important to note at this stage that the fact that Signature Collection membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.

In other words, the Timeshare Regulations did not ban products such as the Signature Collection. They just regulated how such products were marketed and sold.

To conclude, therefore, that Signature Collection membership was marketed or sold to Mr K and Ms L as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told them or led them to believe that Signature Collection membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Signature Collection as an 'investment' or quantifying to prospective purchasers, such as Mr K and Ms L, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Signature Collection membership was not sold to Mr K and Ms L as an investment, and these disclaimers have been signed by both of them.

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And for reasons I'll now come on to, given the facts and

circumstances of this complaint, I think the Supplier is likely to have breached Regulation 14(3) of the Timeshare Regulations.

<u>How the Supplier marketed and sold the Signature Collection membership</u>

Over the course of the Financial Ombudsman Service's work on complaints involving fractional timeshare sales, the Supplier has provided a training material document called "2015 SPAIN FRACTIONALS AT SIGNATURE SUITE COLLECTION SALES TRAINING MANUAL FOR FPOC AND VACATION CLUB OWNERS" ('the Manual') used to train its sales agents in the selling of the product purchased by Mr K and Ms L.

As I understand it, the Manual was in use at the time Mr K and Ms L made their purchase. It's not entirely clear whether they would have been shown the slides included in the Manual, but it seems to me to be reasonably indicative of:

(1) *The training the Supplier's sales agents would have got before selling Mr K and Ms L's Signature Collection membership; and*

(2) *how the sales agents would have framed the sale of Signature Collection membership to them.*

Having looked through the Manual, I am first drawn to the slide on page 11, which is the first slide that brings in the Signature Collection membership and its purpose. It says:

> *"When our members asked if they could buy a [Supplier] property in its entirety, we developed [Supplier] Estates which has been tremendously successful and has now sold over 2000 properties all around the world.*
>
> *In recent years our members requested shorter term products so to fulfil that demand we created our Fractional Property Owners Club which is a shorter term product with a fixed asset attached providing an exit in 19 years and money back"*

This slide strongly suggests the sales agent is likely to have made the point to the customer that purchasing the membership would allow them to own a physical asset, that being the fraction of a real property, and that this ownership would lead to "money back" at the end of the term.

From the off, therefore, it seems likely that the sales agent would have demonstrated that there was a significant financial advantage to gaining the membership that set it apart from membership of a 'standard' timeshare that only provided customers with holiday rights.

I've then considered the slides copied below, which are found on page 106:

These slides appear in a part of the presentation titled "In House Game Plan for Vacation Club Owners". Mr K and Ms L were not Vacation Club Owners but were existing fractional members (Fractional Club) at the Time of Sale. However, I've thought about what these slides show as being indicative of the sales practices by the Supplier at that time. And this includes the Supplier's use of the word "investment" to describe Signature Collection membership. So, although I accept this part of the slide deck was probably not shown to Mr K and Ms L, I also think it was likely that the Supplier's sales staff would have been trained to talk about Signature Collection memberships like Mr K and Ms L's as investments at the Time of Sale. That means there was a real possibility that was done in Mr K and Ms L's sale.

I acknowledge that there may not have been a comparison between the expected level of financial return and the purchase price of Signature Collection membership. However, if I were to only concern myself with express efforts to quantify to Mr K and Ms L the financial value of the proprietary interest they were offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3).

When the Government consulted on the implementation of the Timeshare Regulations, it discussed what marketing or selling a timeshare as an investment might look like – saying that '[a] trader must not market or sell a timeshare or [long-term] holiday product as an investment. For example, there should not be any inference that the cost of the contract would be recoupable at a profit in the future (see regulation 14(3)).'[2] *And in my view that must have been correct because it would defeat the consumer-protection purpose of Regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.*

So, if a supplier implied to consumers that future financial returns (in the sense of possible profits) from a timeshare were a good reason to purchase it, I think its conduct was likely to have fallen foul of the prohibition against marketing or selling the product as an investment.

Indeed, if I'm wrong about that, I find it difficult to explain why, in paragraphs 77 and 78 followed by 99 and 100 of Shawbrook & BPF v FOS when, Mrs Justice Collins Rice said the following:

> *"[…] I endorse the observation made by Mr Jaffey KC, Counsel for BPF, that, whatever the position in principle,* ***it is apparently a major challenge in practice for timeshare companies to market fractional ownership timeshares consistently with Reg.14(3). […] Getting the governance principles and paperwork right may not be quite enough.***
>
> ***The problem comes back to the difficulty in articulating the intrinsic benefit of fractional ownership over any other timeshare from an individual consumer perspective****. […]* ***If it is not a prospect of getting more back from the ultimate proceeds of sale than the fractional ownership cost in the first place, what exactly is the benefit?*** *[…] What the interim use or value to a consumer is of a prospective share in the proceeds of a postponed sale of a property owned by a timeshare company – one they have no right to stay in meanwhile – is persistently elusive."*
>
> *"[...] although the point is more latent in the first decision than in the second, it is clear that both ombudsmen viewed fractional ownership timeshares – simply by virtue of the*

[2] The Department for Business Innovation & Skills *"Consultation on Implementation of EU Directive 2008/122/EC on Timeshare, Long-Term Holiday Products, Resale and Exchange Contracts (July 2010)".* https://assets.publishing.service.gov.uk/media/5a78d54ded915d0422065b2a/10-500-consultation-directive-timeshare-holiday.pdf

> *interest they confer in the sale proceeds of real property unattached to any right to stay in it, and the prospect they undoubtedly hold out of at least 'something back' – as products which are inherently dangerous for consumers.* ***It is a concern that, however scrupulously a fractional ownership timeshare is marketed otherwise, its offer of a 'bonus' property right and a 'return' of (if not on) cash at the end of a moderate term of years may well taste and feel like an investment to consumers who are putting money, loyalty, hope and desire into their purchase anyway.*** *Any timeshare contract is a promise, or at the very least a prospect, of long-term delight. [...] A timeshare-plus contract suggests a prospect of happiness-plus. And a timeshare plus 'property rights' and 'money back' suggests adding the gold of solidity and lasting value to the silver of transient holiday joy." (Emphasis is my own.)*

Having considered the training materials I've seen from the Supplier in the round, I recognise that the Manual is mainly taken up with explaining and selling the additional benefits of the Signature membership, namely the luxurious nature of the accommodation and the services on offer to members, and Mr K and Ms L acknowledge that when they say the Allocated Property was "a far more desirable property". But I note that there does not appear to be any attempt to minimise or explicitly reject the notion that the Signature Collection membership contained an investment element. Nor have I seen anything that contradicts or clashes with what Mr K has said about the way the membership was sold to them. Given this, I think it's more likely than not that the Supplier did, at the very least, imply that future financial returns (in the sense of possible profits) from the membership were a good reason to purchase it. And Mr K has said as much in his statement:

> *"…we were told that through upgrading to a Signature Collection property (which was a far more desirable property), it would prove much easier to resell, it would be a better investment and make us more money, a bigger profit."*

So, overall, I think the Supplier's sales representative, during Mr K and Ms L's sale, was likely to have led them to believe that the Signature Collection membership was an investment that may lead to a financial gain (i.e., a profit) in the future. And with that being the case, I don't find them either implausible or hard to believe when they say they were told that the suites were a more lucrative investment than their existing Fractional Club and would give them more profit. On the contrary, in the absence of evidence to persuade me otherwise, I think that's likely to be what Mr K and Ms L were led by the Supplier to believe at the relevant time.

But in addition to what they were likely told at the Time of Sale, it is important to note that this was the second 'fractional' membership they had purchased – they went through a sales presentation for their Fractional Club membership in 2018. The presentation Mr K and Ms L were likely shown at the Time of Sale would have been different to that which they would have been shown for their previous fractional purchase, and although I am not considering a complaint here about the Fractional Club membership and how it was sold, when looking at the circumstances as a whole I think it is fair to consider what Mr K and Ms L were likely told about the Fractional Club membership in 2018, as that is likely to have set the tone for this subsequent Signature Collection purchase. Although there were subtle differences in the products and how they were sold, they were after all, both fractional memberships which were asset-backed with an Allocated Property designed to provide members with the net proceeds of its sale value.

And, as I go on to explain below, when the Fractional Club membership was marketed to Mr K and Ms L in 2018, although I am not making a formal finding on this here, I think it was likely to have given them the impression that the membership was an investment.

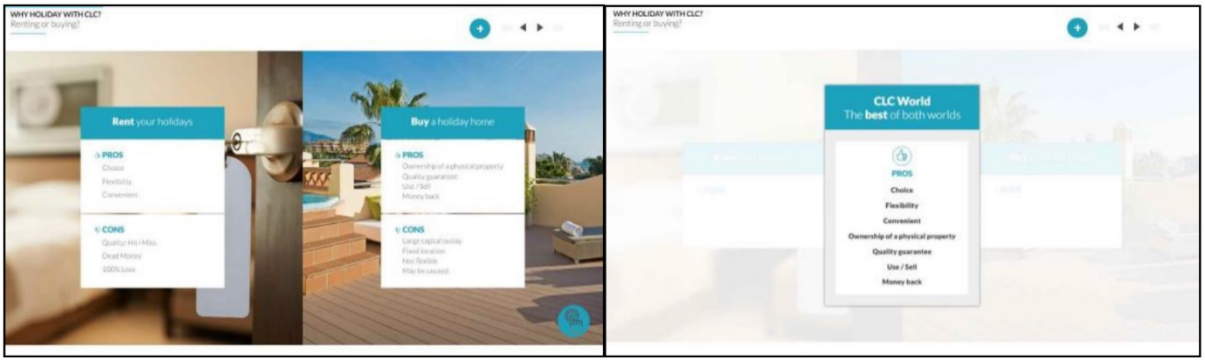
Alongside the information this Service has been given about the training and sales presentations that were associated with the selling of the type of Signature Collection I am considering here, we have also been provided training material used by the Supplier to prepare its sales representatives for selling the type of membership (known by the Supplier as 'FPOC2' but I shall continue to refer to it as the Fractional Club) bought by Mr K and Ms L in 2018 has also been provided to us – which includes a document called the "Fractional Property Owners Club Fly Buy Manual 2017" (the '2017 Fractional Training Manual').

It is not entirely clear whether Mr K and Ms L would have been shown the slides included in the Manual. But it seems to me to be reasonably indicative of:

(1) *The training the Supplier's sales representatives would have got before selling Mr K and Ms L's Fractional Club membership; and*

(2) *how the sales representatives would have framed the sale of Fractional Club membership to them.*

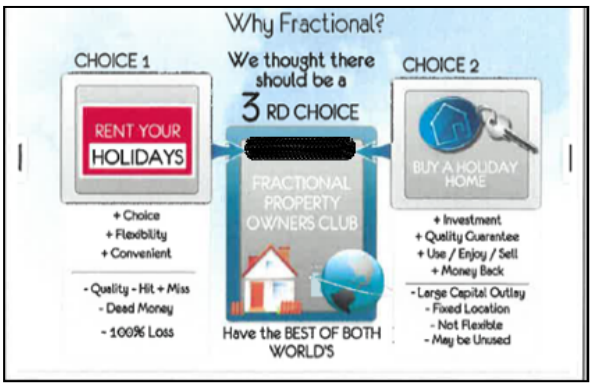
Having looked through the Manual, my attention is drawn first to page 19 (of 74) – which includes two slides called "Why holiday with [the Supplier]? Renting or buying?".



They were the first slides in the Manual that seems to me to set out any information about Fractional Club membership, albeit without expressly referring to the Fractional Club, because they suggest that sales representatives were likely to have made the point to Mr K and Ms L that holidaying with the Supplier combined the best of (1) and (2), including, amongst other things, ownership of a physical property and money back – which were benefits that were only front and centre of Fractional Club membership.

From the off, therefore, it seems likely that sales representatives would have demonstrated that there were financial advantages to Fractional Club membership rather than being a member of a 'standard' timeshare.

Indeed, the slides above presented a very similar prospect to that presented in a slide used in one of the Supplier's earlier training manuals that was used to help it sell the first version of Fractional Property Owners Club:



All three indicate that sales representatives would have taken prospective members through three holidaying options along with their positives and negatives:

(1) *"Rent Your Holidays"*
(2) *"Buy a Holiday Home"*
(3) *The "Best of Both Worlds"*

I acknowledge that the slides incorporated into the 2017 Fractional Training Manual don't include express reference to the 'investment' benefit of Fractional Club membership. But they allude to much the same concept.

One of those advantages referred to in the slides on page 19 of the 2017 Fractional Training Manual is the "ownership of a physical property". And as an owner's equity in their property is built over time as the value of the asset increases relative to the size of any mortgage secured against it, this particular advantage of Fractional Club membership was portrayed in terms that played on the opportunity ownership gave prospective members of the Fractional Club to accumulate wealth in a similar way.

When the Manual moved on to describe how membership of the Fractional Club worked between pages 26 and 36, one of the major benefits of Fractional Club membership was described on page 35 as:

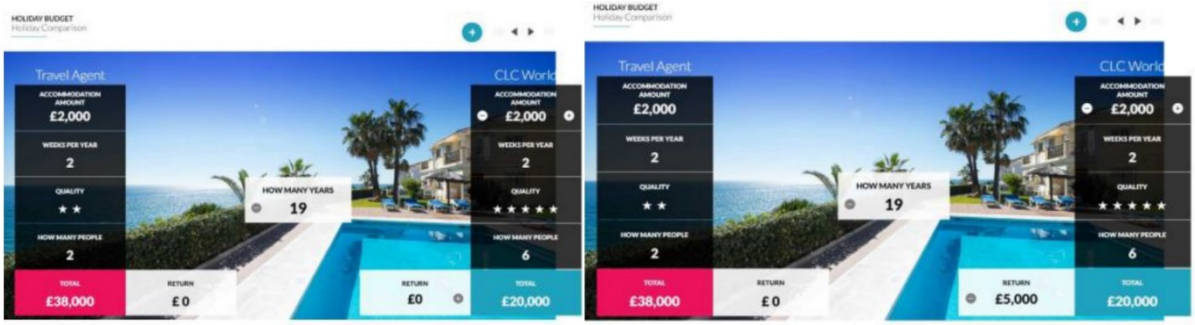
> *"A major benefit is that after 19 years of fantastic holidays, the property in which you own a fraction is sold and you will receive your share of the sale proceeds according to the number of fractions owned."*

And on page 36 there were notes that encouraged sales representatives to summarise this benefit in the following way:

> *"So really FPOC equals a passport to fantastic holidays for 19 years with a return at the end of that period. When was the last time you went on holiday and got some money back?".*

After discussing some of the other aspects of membership, such as the different resorts available to members, page 53 of the Manual indicates that sales representatives would have moved onto a cost comparison between "renting" holidays and "owning" them. Sales representatives were encouraged to tell prospective members how much they would spend over 19 years (i.e., the length of Fractional Club membership) on holidays with "no return" in contrast to spending the same amount of money as Fractional Club members – thus demonstrating the financial advantages of membership.

Page 53 included the following slides and accompanying notes:



> *"We aren't only talking about 10 years, we are talking about 19 years. So in actual fact, with the travel agent over 19 years you would have spend over £… with no return.*
>
> *However, with [the Supplier] you would still have spent the same £… because once your fraction is paid for, the remaining years of holiday accommodation is taken care of.*
>
> *We also agreed that you would get nothing back from the travel agent at the end of this holiday period. Remember with your fraction at the end of the 19 year period, you will get some money back from the sale, so even if you only get say £5,000, it would still be more than you would get renting your holidays from a travel agent wouldn't it."*

I acknowledge that the slides above set out a "return" that is less than the total cost of the holidays and the "initial outlay". But that was just an example and, given the way in which it was positioned in the 2017 Fractional Training Manual, the language did leave open the possibility that the return could be equal to if not more than the initial outlay. Furthermore, the slides above represent Fractional Club membership as:

(1) *The right to receive holiday rights for 19 years whose market value significantly exceeds the costs to a Fractional Club member; plus*

(2) *A significant financial return at the end of the membership term.*

And to consumers (like Mr K and Ms L) who were looking to buy holidays anyway, the comparison the slides make between the costs of Fractional Club membership and the higher cost of buying holidays on the open market was likely to have suggested to them that the financial return was in fact an overall profit.

What's more, I think the Supplier's sales representatives were encouraged to make prospective Fractional Club members (like Mr K and Ms L) consider the advantages of owning something and view membership as a way of generating a return, rather than simply paying for holidays in the usual way. That was likely to have been reinforced throughout the Supplier's sales presentations by describing membership as a form of property ownership referring to the prospect of a "return". And with that being the case, I think the language used during the Supplier's sales presentations was likely to have been consistent with the idea that Fractional Club membership was an investment.

The investment element of the fractional memberships was plainly a major part of its rationale and justification for their cost. And as the memberships were designed to offer members a way of making a financial return from the money they invested – whether or not, like every investment, the return was more, less or the same as the sum invested - it would not have made much sense if the Supplier included the features in the product without relying on them to promote sales.

So, the point I am making is that Mr K and Ms L were likely, from the way the Fractional Club had probably been marketed to them, already of the opinion that it was an investment that

could provide them with a profit at the end of the membership term. And the way the Signature Collection membership was probably sold would have done little to dissuade them from that idea.

The Lender may point to the contemporaneous sale documents and say they show that the Supplier didn't present the Signature Collection membership as an investment. But these disclaimers were contained in documents which were given to Mr K and Ms L to sign after they had been through the sales presentation, and after they had agreed to make the purchase on the basis of the presentation and what they had been told by the Supplier. But it's ultimately difficult to explain why it was necessary to include such disclaimers if there wasn't a very real risk of the Supplier marketing and selling membership as an investment, given the difficulty of articulating the benefit of fractional ownership in a way that distinguishes it from other timeshares from the viewpoint of prospective members.

Further, I find it fanciful that the Supplier would not have highlighted the possible returns available to Mr K and Ms L when selling Signature Collection membership to them given that they already had a Fractional Club membership which they were trading in to make the purchase.

So, when bearing this in mind, and given what I've said about the way I think their Fractional Club membership was sold and/or marketed to them in 2018, I think it is likely that, on the balance of probabilities, the Supplier's sales representative led Mr K and Ms L to believe that the Signature Collection membership, which was an upgrade of their Fractional Club, was also an investment that may lead to a financial gain (i.e., a profit) in the future.

And with that being the case, I do not find Mr K either implausible or hard to believe when he says:

> *"…we were told that through upgrading to a Signature Collection property (which was a far more desirable property), it would prove much easier to resell, it would be a better investment and make us more money, a bigger profit."*

On the contrary, given everything I have seen so far, I think that is likely to be what Mr K and Ms L were led to believe by the Supplier at the relevant time. And for that reason, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale.

<u>Was the credit relationship between the Lender and the Consumer rendered unfair?</u>

Having found that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Mr K and the Lender under the Credit Agreement and related Purchase Agreement, as the case law on Section 140A makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

Indeed, it seems to me that if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr K and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreement and Mr K into the Credit Agreement is an important consideration.

On my reading of Mr K's testimony, the prospect of a financial gain from their Signature Collection membership was an important and motivating factor when they decided to go ahead with their purchase. It seems to me that it is likely, from a combination of what they would likely have been told, what they have said happened, and what they actually did, that

both of their fractional membership purchases followed the same pattern and overall aim, and were linked to the potential profit at the end of each of the membership terms. So, I think it likely that the continuing investment aim and potential profit from the new Allocated Property associated with the Signature Collection was a motivating factor when they decided to upgrade.

That doesn't mean they were not interested in holidays. Their own testimony and holiday reservation history demonstrates that they quite clearly were, which is unsurprising given the nature of the product at the centre of this complaint. And as I've said, the Signature Collection afforded Mr K and Ms L the guaranteed right to stay in their Allocated Property on their set week every year, and the property was apparently more luxurious and better appointed than that available through their Fractional Club. But as Mr K says (plausibly in my view) that the Signature Collection membership was marketed and sold to them at the Time of Sale as something that offered them more than just holiday rights, and specifically that it would be more marketable and provide a bigger profit, on the balance of probabilities I think their purchase was motivated by their share in the Allocated Property and the possibility of a profit.

Mr K and Ms L have not said or suggested, for example, that they would have pressed ahead with the purchase in question had the Supplier not led them to believe that Signature Collection membership was an appealing investment opportunity. And as Mr K faced the prospect of borrowing and repaying a substantial sum of money while subjecting himself and Ms L to long-term financial commitments, had they not been encouraged by the prospect of a financial gain from membership of the Signature Collection, I'm not persuaded that they would have pressed ahead with their purchase regardless.

And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made, and it rendered Mr K's credit relationship with the Lender unfair.

Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr K under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A. And with that being the case, taking everything into account, I think it is fair and reasonable that I uphold this complaint."

I then set out what I thought was a fair and reasonable way for the Lender to calculate and pay fair compensation to Mr K.

The responses to the provisional decision

Mr K, via the PR, accepted the provisional decision with no further comment.

The Lender replied and said that it would not challenge the provisional findings but had some observations on some points that it did not agree with.

As both sides have responded, the complaint has come back to me for a final decision.

The legal and regulatory context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

The legal and regulatory context that I think is relevant to this complaint is, in many ways, no different to that shared in several hundred published ombudsman decisions on very similar complaints – which can be found on the Financial Ombudsman Service's website. And with that being the case, it is not necessary to set out that context in detail here.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

And having done so, and having considered everything again in light of both sides' responses to the PD, I see no reason to depart from the outcome reached in the provisional decision. I remain satisfied that this complaint ought to be upheld, but I will address the concerns raised by the Lender in its response to the PD.

The Lender thought that the PD was premised on a material error of law in its approach to the prohibition under Regulation 14(3) of the Timeshare Regulations. It said the PD had said that the mere existence of the *'prospect of a financial return'* constituted an *'investment',* and in doing so falls into error by conflating two meanings of the word 'return': (i) a 'return on investment', which is normally understood to mean the measure of profit (the return) on the original investment; and (ii) a customer being told that some money will be 'returned' upon sale, which carries no connotation of financial gain/profit. The Lender said that the former is what must not be marketed under the Timeshare Regulations; and the latter is an inherent feature of fractional products and does not breach Regulation 14(3).

But I don't think the Lender has understood the point that was being made here. In the PD I set out what Regulation 14(3) said:

> *"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."*

And then I set out the definition of the word 'investment' I was using:

> *"The term "investment" is not defined in the Timeshare Regulations. But for the purposes of this provisional decision, and by reference to the decided authorities, an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit."*

But the Fractional Club was asset-backed by an Allocated Property, and the share in this property clearly constituted an investment as it offered the member the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But there was no conflation of the word 'return' because I made it clear that the fact that the fractional membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the *marketing and selling* of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract *per se*. So, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold.

The Lender also thought that the PD had dismissed the disclaimers contained in the contractual paperwork with no proper basis or explanation, despite observing that they emphasised that the product should not be seen as an investment, and had been signed by Mr K and Miss L. It said that the disclaimers had been found to evidence compliance with Regulation 14(3).

And I agree with the Lender to the extent that the disclaimers did set out that the membership should *not* be looked at as a financial investment, and Mr K and Miss L signed to say they had read and understood that. But these disclaimers were contained in documents which were given to Mr K and Miss L to sign *after* they had been through the sales presentation, and *after* they had agreed to make the purchase on the basis of the presentation and what they had been told by the Supplier. And as I set out, that presentation suggested that the membership could lead to a financial gain (i.e. a profit) from the sale of the associated Allocated Property. So, I think it unlikely that, having made a decision to purchase on the basis of what they had seen and heard, the disclaimers would have done much to dissuade Mr K and Miss L from thinking that the membership was an investment. It is also ultimately difficult to explain why it was necessary to include such disclaimers if there wasn't a very real risk of the Supplier marketing and selling membership as an investment, given the difficulty of articulating the benefit of fractional ownership in a way that distinguishes it from other timeshares from the viewpoint of prospective members.

The Lender said that the wrong test had been applied to determine whether the credit relationship between it and Mr K was unfair. It then quoted the following:

> *"In the PD, at page 14, the Ombudsman appears to have adopted a different test than that of cited in Carney, he states "I think their purchase was motivated by their share in the Allocated Property and the possibility of a profit... And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decisions they ultimately made"".*

It said that this appears to reverse the burden of proof, in that I had appeared to start from the position that the prospect of a financial gain existed, but this was not insignificant enough for it not to render the relationship unfair. It said the starting point is to assess whether there is sufficient evidence of a material impact on the decision to enter the agreement. The Lender thought that in the absence of this evidence, the relationship ought not to be found unfair.

But the Lender appears to have misunderstood what I had said. The burden of proof has not been reversed here. It is clear that it was on the basis that the Supplier's breach of Regulation 14(3) at the Time of Sale was material to their purchasing decisions that I decided that the associated credit relationships had been rendered unfair.

So, I am satisfied, as I set out in the PD, that Mr K and Miss L were motivated to make their Fractional Club purchase because of the associated share in the Allocated Property and the possibility of a profit. And because of that, the breach of Regulation 14(3) by the Supplier was material to the purchasing decision they ultimately made.

The Lender then concluded by saying that the reliance on the witness testimony was unsafe. It thought this because the testimony contained vague and brief allegations, as well as being inconsistent and generic. It said it would have expected there to have been information about what Mr K and Miss L were told about the likely return or mechanisms of how the agreement works, which has not been mentioned. The allegation's credibility, that the product was sold as an investment, has not been challenged.

But the PD considered, in some detail, both the provenance and contents of the statement, and I was satisfied that what had been recorded was Mr K's recollections of their purchase. And I was satisfied, being cognisant of the fact that memories can fade over time, that Mr K's testimony could be relied on. Having reconsidered everything again, I remain satisfied that it is safe to place weight on Mr K's testimony when considering what most likely happened at the Time of Sale. And I find that his testimony, when considered alongside all of the evidence and circumstances, persuades me that the Supplier breached Regulation 14(3) of

the Timeshare Regulations at the Time of Sale, and that breach was material to Mr K and Miss L's purchasing decision.

Conclusion

So, although the Lender has said it would not challenge my provisional decision that this complaint ought to be upheld, I have considered everything that it has said in response. And having done so, I remain satisfied that this complaint ought to be upheld. I think the Lender participated in and perpetuated an unfair credit relationship with Mr K under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A

Putting things right

In the PD I set out what I considered to be a fair and reasonable way for the Lender to calculate and pay fair compensation to Mr K. Neither side has made any comment on my proposed redress, so I see no reason to depart from my provisional thoughts on this issue.

For the avoidance of doubt, I shall set out my directions below.

Fair Compensation

Having found that Mr K and Ms L would not have agreed to purchase Signature Collection membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and Mr K was unfair under Section 140A of the CCA, I think it would be fair and reasonable to put him back in the position he would have been in had they not purchased the Signature Collection membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement. This is on the proviso that Mr K and Ms L both agree to assign to the Lender the additional 220 fractional points they gained at the Time of Sale, or hold them on trust for the Lender if that can be achieved.

As I've said, Mr K and Ms L were existing Fractional Club members, and their membership was traded in against the purchase price of the Signature Collection membership in question. Under their Fractional Club membership, they had 1,320 fractional points. And, like Signature Collection, they had to pay annual management charges as part of Fractional Club membership. So, had Mr K and Ms L not purchased the Signature Collection, they would have always been responsible to pay an annual management charge of some sort. With that being the case, any refund of the annual management charges actually paid by Mr K and Ms L from the Time of Sale as part of the Signature Collection should amount only to the difference between those charges and the annual management charges they would have paid as part of their Fractional Club membership.

Further, their Fractional Club membership was paid for using finance ('Loan 1') from the Lender that was refinanced using the Credit Agreement. So, part of what Mr K borrowed at the Time of Sale was used to repay the borrowing under Loan 1 that always had to be repaid. But no complaint has been made about the previous Fractional Club sale, and there is no suggestion made anywhere that Mr K and Ms L were unhappy with their Fractional Club membership or the loan taken to fund its purchase. Indeed, the Letter of Complaint to the Lender, and the referral of that complaint to this Service is specific in only talking about the Time of Sale and the Signature Collection membership. So, I do not think it would be fair to require the Lender to refund everything that was paid and, if relevant, due to be repaid under the Credit Agreement, otherwise Mr K would be in a better position than he would have been if they hadn't purchased Signature Collection. Given that, I think this ought to be reflected in my redress when remedying the unfairness I have found.

However, I am also conscious that this means Mr K paid for a Fractional Club membership under which he and Ms L were entitled to a share in an allocated property. But they no longer have this share because the membership was traded in against the Signature Collection. I set this out in the provisional decision and asked Mr K if he wished for their previous Fractional Club membership to be reinstated if possible. He did not respond to this point, so I do not think I need to consider it further.

So, here's what I direct the Lender to do to compensate Mr K with that being the case – whether or not a court would award such compensation:

(1) The Lender should refund the difference between Mr K's repayments to it under the Credit Agreement and what would have been paid under Loan 1, including the difference between any sums paid to settle the debt owing under the Credit Agreement and what would have needed to have been paid to settle Loan 1. The Lender should also reduce any outstanding balance under the Credit Agreement, if there is one, so that Mr K would only owe now what they would have owed under Loan 1 and change any future repayments so that he is making the same repayments that were being made towards Loan 1.

(2) In addition to (1), the Lender should also refund the difference between the annual management charges they actually paid after the Time of Sale under the Signature Collection and what Mr K and Ms L's annual management charges would have been under their Fractional Club membership had they not purchased Signature Collection.

(3) The Lender can deduct:

   i. The value of any promotional giveaways that Mr K and Ms L used or took advantage of; and

   ii. The market value of the holidays* Mr K and Ms L took using the Signature Collection membership *if* the Points value of the holiday(s) taken amounted to more than the total number of fractional points they would have been entitled to use at the time of the holiday(s) as ongoing Fractional Club members. However, this deduction should be proportionate and relate only to the additional fractional points that were required to take the holiday(s) in question.

   For example, if Mr K and Ms L took a holiday worth 2,550 fractional points after the Time of Sale and they would have been entitled to use a total of 2,500 fractional points under their Fractional Club membership at the relevant time, any deduction for the market value of that holiday should relate only to the 50 additional fractional points that were required to take it. But if they would have been entitled to use 2,600 fractional points under their Fractional Club membership, for instance, there shouldn't be a deduction for the market value of the relevant holiday.

   (I'll refer to the output of steps 1 to 3 as the 'Net Repayments' hereafter)

(4) Simple interest** at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.

(5) The Lender should remove any adverse information recorded on Mr K's credit file in connection with the Credit Agreement reported within six years of this decision.

(6) If the Signature Collection membership is still in place at the time of this decision, as long as Mr K and Ms L both agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of the Signature Collection membership.

*I recognise that it can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been available on the open market. So, if it isn't practical or possible to determine the market value of the holidays Mr K and Ms L took using their fractional points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.

**HM Revenue & Customs may require the Lender to take off tax from this interest. If that's the case, the Lender must give Mr K a certificate showing how much tax it's taken off if he asks for one.

My final decision

I uphold this complaint, and direct Shawbrook Bank Limited to calculate and pay fair compensation to Mr K as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K to accept or reject my decision before 13 March 2026.

Chris Riggs
Ombudsman